

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:CTM:LN:TL-N-967-01

JMMarr

date: MAY 26 2000

to: Ethelyn McDaniel, Coordinated Industry Team Manager, CE:1105  
Patricia Lozano, Team Coordinator, Long Beach POD, CE:1105

from: Joyce M. Marr, Attorney  
June Y. Bass, Associate Area Counsel, LMSB

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subject: [REDACTED]  
Tax Years [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]  
TIN: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

The purpose of this memorandum is to modify the advisory opinion we rendered on November 19, 1999, concerning how to secure valid consents to extend the statute of limitations on assessment of withholding taxes against two dissolved subsidiaries of [REDACTED] which were incorporated under Delaware law, specifically [REDACTED] and [REDACTED]. A copy of that advice is enclosed herewith.

### ISSUE

Whether the Service is required to issue any notices of deficiency to the aforesaid dissolved subsidiaries prior to the expiration of the three-year winding-up period under 8 Del. Code § 278.

### DISCUSSION

Unfortunately, on page 8 of the aforesaid advisory opinion, dated November 19, 1999, we included the following statement which was not necessary to the conclusions reached therein:

While the execution of a waiver appears to be incident to the winding up of the affairs of a corporation, the execution of a waiver does not constitute the commencement of a suit or proceeding. Rather, it is the service of a notice of deficiency that constitutes the commencement of a suit or proceeding. See Ross v. Venezuelan-American Indep. Oil Producers Ass'n., 230 F. Supp. 701 (D. Del. 1964). Accordingly, in order for the Service to comply with Section 278, any notice of deficiency must be served within the three year winding up period.<sup>1</sup>

Recently, during a discussion with you, we noted that the preceding statement apparently requires that the Service issue any notices of deficiency for withholding tax liabilities of the dissolved subsidiaries, which were incorporated in Delaware, within the three-year winding-up period under Delaware law. You indicated that it is likely that the Service would not issue any notices of deficiency to the dissolved Delaware subsidiaries until after the three-year winding-up periods expire, unless the Service is actually required to issue the notices of deficiency earlier. Hence, we have obtained clarification as to whether any notices of deficiency in fact must be issued within the winding-up periods under 8 Del. Code § 278.

As you know, a withholding liability under I.R.C. § 1441 or § 1442 is subject to the deficiency procedures. Under I.R.C. § 6212(b) (1), even though a corporation may have dissolved or

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<sup>1</sup> The statement in our prior opinion was based upon guidance given in Field Service Advice TL-N-7195-94 (September 15, 1994). The Code provides that Chief Counsel advice, which includes Field Service Advice, cannot be used or cited as precedent. I.R.C. §§ 6110(k) (3), (b) (1) and (i) (1) (A). Thus, the statement made in TL-N-7195-94 does not constitute precedent.

terminated, a notice of deficiency mailed to the last known address of the defunct corporation is valid. I.R.C. § 6212(a) and (b)(1) provide, in pertinent part, as follows:

6212(a). IN GENERAL.--If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A ... he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail....

6212(b) ADDRESS FOR NOTICE OF DEFICIENCY.--

6212(b)(1) INCOME AND GIFT TAXES AND CERTAIN EXCISE TAXES.-  
- In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A ... if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A ... and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(Emphasis supplied.)


Thus, the validity of a deficiency notice issued to a dissolved corporation at its last known address is well settled, where the Service has not received a notice of the existence of a fiduciary relationship. Padre Island Thunderbird Inc. v Commissioner, 72 T.C. 391, (1979).<sup>2</sup> Accordingly, the Service may issue a valid notice of deficiency to a dissolved corporation anytime within the statute of limitations on assessment, without regard to whether a winding-up period under state law has terminated to pursue transferee liability. However, if the Service wishes to continue the existence of the dissolved Delaware corporations in order to proceed against them, then it must issue any notice of

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<sup>2</sup> A dissolved Delaware corporation lacks capacity pursuant to Delaware law to litigate the determination made in a statutory notice of deficiency if a Tax Court proceeding is not commenced within the three-year winding-up period. See Tax Court Rule 60(c) (capacity of a corporation to engage in litigation before the Tax Court is determined by the law under which the corporation was organized); 8 Del. Code § 278; and Bahen & Wright v. Commissioner, 176 F.2d 538 (4th Cir. 1949) (concluding that the issuance of a notice of deficiency was the commencement of a "proceeding" during the period while a corporation's existence was perpetuated by the predecessor of current 8 Del. Code § 278).

deficiency during the three-year winding-up period. For all other purposes, including the pursuit of transferee liability, any notice of deficiency is not required to be issued during the winding-up period.

This advice has been coordinated with the Office of Chief Counsel. Please contact the undersigned at (949) 360-2688 if you have any questions concerning the foregoing.

  
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JOYCE M. MARR  
Attorney

Enclosure: as stated